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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-729

STATE OF MISSOURI, ex rel. O. J. GIBSON, JR.,
and CAPE GIRARDEAU COUNTY
BAR ASSOCIATION,
Relators-Petitioners,

vs.

The Honorable STANLEY A. GRIMM, Judge, Circuit
Court of Cape Girardeau County, Missouri,
Respondent.

Consolidated with

State of Missouri, Appellant,

vs.

Michael Wayne Probst, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

List of Citations I
Opinion Below 1
Jurisdiction 2
Question Presented 2
Constitutional Provisions Involved 2
Statement of the Case 2
Argument 5
Conclusion 10
Certificate of Service 10

List of Citations

CASES CITED

Board of Supervisors of George County v. *Bailey*, 236 So.2d 420 (Miss. 1970) 7
Botts v. *United States*, 413 F.2d 41 (9th Cir. 1969) 7
Bradshaw v. *Ball*, 487 S.W.2d 294 (Ky. 1972) 8
Brown v. *Board of County Commissioners of Washoe County*, 451 P.2d 708 (Nev. 1969) 7
Dade County v. *McCrary*, 260 So.2d 543 (Fla.Dist.Ct. App., 3rd Dist. 1972) 7
deRodulfa v. *United States*, 461 F.2d 1240 (D.C.Ct.App. 1972) 7, 8
Dolan v. *United States*, 351 F.2d 671 (5th Cir. 1965) 7
Jackson v. *State*, 413 P.2d 488 (Alas. 1966) 7
People v. *Hutchinson* v. *Shuster*, 195 N.W.2d 787 (Mich. Ct.App., Div. 3, 1972) 7-8
Powell v. *Alabama*, 287 U.S. 45 (1932) 7
State v. *Corey*, 117 N.J.Sup. 296, 284 A.2d 395 (Passaic County Court 1971), aff'd 293 A.2d 196 (Superior Court of New Jersey 1972), cert. denied 409 U.S. 1125 8

State v. *Rush*, 46 N.J. 399, 217 A.2d 441 (N.J. 1966) 8
State ex rel. Gentry v. *Becker*, 174 S.W.2d 181 (Mo. 1943) 7
State ex rel. Gibson v. *Grimm*, 540 S.W.2d 17 (Mo. Banc 1976) 5
State ex rel. Partain v. *Oakley*, 227 S.E.2d 314 (W.Va. 1976) 7, 8
Tyler v. *Lark*, 472 F.2d 1077 (8th Cir. 1973), cert. denied 414 U.S. 840 7
United States v. *Dillon*, 346 F.2d 633 (9th Cir. 1965), cert. denied 382 U.S. 978 7, 9
Wright v. *Louisiana*, 362 F.2d 95 (5th Cir. 1966) 7

OTHER AUTHORITIES

Annot. 21 A.L.R.3d 819 (1968) 7
Criminal Justice Act of 1964 (18 U.S.C. §3006A) 9
House Bill 4, currently pending before 79th General Assembly of Missouri 6
House Bill 16, currently pending before 79th General Assembly of Missouri 6
S.C.S. H.B.S. House Bill No. 1095, 2nd Regular Session, 78th General Assembly, effective August 13, 1976 6, 9
Sections 600.010-600.166, V.A.M.S., 1977, Cum. Annual Pocket Part 6
28 U.S.C. §1257(3) 2

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Missouri, en banc, reversing the Order taxing costs and discharging the preliminary rule in prohibition is reported as follows: *State ex rel. Gibson* v. *Grimm*, consolidated with *State* v. *Probst*, 540 S.W.2d 17 (Mo. Banc 1976).

JURISDICTION

This Court has jurisdiction pursuant to Title 28 U.S.C., §1257(3), which provides that this Court may review the final judgment of the highest court of the state by writ of certiorari where title, right, privilege, or immunity is specially set up or claimed under the Constitution of the United States.

QUESTION PRESENTED

1. Whether the holding of the Supreme Court of Missouri that the attorneys of Missouri were required to accept uncompensated appointments to represent indigent criminal defendants prior to August 13, 1976, in misdemeanor cases where a sentence of imprisonment may have been imposed, operates to deny the petitioner, O. J. Gibson, Jr., his constitutional rights to due process of law, the equal protection of the law and freedom from involuntary servitude?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Twelfth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

The two cases involved in this petition for writ of certiorari arise out of the appointment of Ora James Gibson, Jr., to represent Michael Wayne Probst.

On March 26, 1975, Michael Wayne Probst was charged with a violation of §560.395, RSMo 1969, a misdemeanor

punishable by fine, imprisonment, or both fine and imprisonment. On April 10, 1975, the petitioner, O. J. Gibson, Jr., a member of the Cape Girardeau County Bar Association, was appointed by the Honorable Jerry S. Estes, Judge of the Magistrate Court of Cape Girardeau County, Missouri, to defend Probst, an indigent. On June 6, 1975, Probst was found guilty as charged and sentenced to six months in the County Jail. Mr. Gibson, on behalf of Probst, prosecuted an appeal to the Circuit Court of Cape Girardeau County, Missouri. On August 12, 1975, a jury found Probst guilty of the charges contained in the complaint and sentenced him to six months' imprisonment in the County Jail. Mr. Gibson then filed, on behalf of Probst, a motion for new trial, which was argued on September 15, 1975, and thereafter denied.

Subsequently, Michael Wayne Probst advised the Circuit Court of Cape Girardeau County, Missouri, that he desired to perfect an appeal from the judgment of that court in overruling his motion for new trial. On December 3, 1975, the Honorable Stanley A. Grimm, Judge of the Circuit Court of Cape Girardeau County, Missouri, respondent herein, notified Mr. Gibson that he intended to reappoint him as attorney for Probst for the purpose of prosecuting the appeal.

By letter of December 5, 1975, Mr. Gibson informed the respondent of his unwillingness to proceed further with the defense of Michael Wayne Probst. Thereafter, on December 9, 1975, the respondent advised Mr. Gibson of the court's intention to hold him in contempt if he refused reappointment to prosecute the appeal.

On December 12, 1975, the Cape Girardeau Bar Association advised the Honorable Jerry S. Estes, Judge of the Magistrate Court of Cape Girardeau County, Missouri, and the respondent that ". . . hereafter members

of the Cape Girardeau County Bar Association will not feel *compelled* to accept appointments to represent indigent defendants accused of crimes punishable by imprisonment . . ., without payment of just compensation therefor . . ."

On December 15, 1975, the respondent entered his Order stating the court's intention to appoint Mr. Gibson to prosecute the appeal of Michael Wayne Probst and, in the event of a refusal on the part of Mr. Gibson, to hold him in contempt of court.

On December 30, 1975, the petitioners filed their petition for writ of prohibition and suggestions in support thereof with the Missouri Court of Appeals, St. Louis District. On that same date, the Missouri Court of Appeals, St. Louis District, entered its Order granting the preliminary writ of prohibition. The writ was made returnable on January 7, 1976.

On December 2, 1975, Mr. O. J. Gibson, Jr., filed a motion for allowance of attorney's fees and expenses in the Circuit Court of Cape Girardeau County. On the same date, the Cape Girardeau County Bar Association moved for leave to file a memorandum in support of Mr. Gibson's motion for allowance of attorney's fees and expenses. After the motion was granted, the Cape Girardeau Bar Association filed its memorandum on December 3, 1975.

On December 3, 1975, the Circuit Court of Cape Girardeau County, Missouri, entered its Order allowing attorney's fees and out-of-pocket expenses, taxing the costs to the State of Missouri and the County Court of Cape Girardeau County, Missouri.

On December 4, 1975, Mr. A. J. Seier, Jr., Prosecuting Attorney of Cape Girardeau County, Missouri, filed his motion to retax costs. Said motion alleged that no statu-

tory authority existed for the payment of fees to attorneys appointed by the court to defend indigent defendants in misdemeanor cases. On December 15, 1975, the Circuit Court sustained the motion as to the County of Cape Girardeau, Missouri, and overruled the motion as to the State of Missouri.

On December 23, 1975, the Prosecuting Attorney of Cape Girardeau County, Missouri, filed notice of appeal to the Missouri Court of Appeals, St. Louis District, on behalf of the State of Missouri.

Although portions of the statistical data included in the petitioners' appendix were included in the petitioners' brief filed in the consolidated case in the Missouri Court of Appeals, St. Louis District, the respondent notes that the data has never been received into evidence at an adversary proceeding and the State of Missouri has never enjoyed the opportunity to litigate the statistical validity of the data or to require the petitioners to establish the truth of the factual assertions.

ARGUMENT

The decision of the Supreme Court of Missouri holding that the attorneys of Missouri were required to accept uncompensated appointments to represent indigent criminal defendants prior to August 13, 1976, in misdemeanor cases where a sentence of imprisonment may have been imposed does not operate to deny the petitioners due process of law, the equal protection of the law, or freedom from involuntary servitude.

In *State ex rel. Gibson* v. *Grimm*, 540 S.W.2d 17, 18 (Mo. Banc 1976), the Supreme Court of Missouri held that the attorneys of Missouri were required to accept

uncompensated appointments to represent indigent criminal defendants prior to August 13, 1976, in misdemeanor cases where a sentence of imprisonment may have been imposed. In reaching this decision, the Supreme Court of Missouri recognized that money may not be withdrawn from the state treasury absent an appropriation law, and noted that the burden previously placed on the attorneys of Missouri ended, for practical purposes, with the enactment of S.C.S. H.B.S. House Bill No. 1095, 2nd Regular Session, 78th General Assembly, effective August 13, 1976 (*Id.* at 18). The Revised Statutes of Missouri now provide for the appointment of the circuit public defender or compensated counsel in misdemeanor cases which will probably result in confinement in the county jail upon conviction (§§600.010-600.166, V.A.M.S., 1977 Cumulative Annual Pocket Part).

Additionally, §600.010(1), V.A.M.S., 1977 Cumulative Annual Pocket Part, provides for the appointment of a public defender in the 32nd Judicial Circuit, which includes Cape Girardeau County, Missouri. Under House Bill No. 16, currently pending before the 79th General Assembly, the Public Defender Commission will receive $661,033.00 as an emergency appropriation for the period ending June 30, 1977. Under House Bill No. 4, currently pending in the 79th General Assembly, the Public Defender System will receive $2,593,092.00 for the period beginning July 1, 1977, and ending June 30, 1978. Under these circumstances, the decision of the Supreme Court of Missouri certainly does not operate to deprive the petitioners of due process of law, the equal protection of the law, or freedom from involuntary servitude, since the condition of which the petitioners complain has been remedied by the State of Missouri.

Further, as officers of the court, attorneys are bound to render service when appointed by the court. *Powell* v. *Alabama*, 287 U.S. 45, 73 (1932). A license to practice law confers upon an attorney certain rights and privileges and with them imposes duties and obligations to be reciprocally enjoyed and performed. *State ex rel. Gentry* v. *Becker*, 174 S.W.2d 181, 184 (Mo. 1943); *Jackson* v. *State*, 413 P.2d 488, 489-490 (Alas. 1966); *Brown* v. *Board of County Commissioners of Washoe County*, 451 P.2d 708, 709 (Nev. 1969); *Dade County* v. *McCrary*, 260 So.2d 543, 545-546 (Fla. Dist. Ct. App., 3rd Dist. 1972); *United States* v. *Dillon*, 346 F.2d 633, 635-637 (9th Cir. 1965), cert. denied 382 U.S. 978; *Tyler* v. *Lark*, 472 F.2d 1077, 1079 (8th Cir. 1973), cert. denied 414 U.S. 840; *Wright* v. *Louisiana*, 362 F.2d 95 (5th Cir. 1966); and *Dolan* v. *United States*, 351 F.2d 671, 672 (5th Cir. 1965). Therefore, the general rule recognized in the overwhelming majority of state and federal jurisdictions remains that an attorney must render service without compensation when appointed to represent an indigent defendant unless a specific statute provides compensation. *DeRodulfa* v. *United States*, 461 F.2d 1240, 1256 (D.C.Ct.App. 1972); *Botts* v. *United States*, 413 F.2d 41, 44 (9th Cir. 1969); *Board of Supervisors of George County* v. *Bailey*, 236 So.2d 420, 422-423 (Miss. 1970); *State ex rel. Gentry* v. *Becker, supra*; *Jackson* v. *State, supra*; *Brown* v. *Board of County Commissioners of Washoe County, supra*; *Dade County* v. *McCrary, supra*; *United States* v. *Dillon, supra*; *Tyler* v. *Lark, supra*; *Wright* v. *Louisiana, supra*; and *Dolan* v. *United States, supra*. See also *Annot.* 21 A.L.R.3d 819 (1968).

The requirement that an attorney render gratuitous service to a court does not, per se, deny due process of law. *United States* v. *Dillon, supra; Tyler* v. *Lark, supra*; *State ex rel. Partain* v. *Oakley*, 227 S.E.2d 314, 318-319 (W.Va. 1976); *People* v. *Hutchinson* v. *Shuster*,

195 N.W.2d 787, 788 (Mich.Ct.App., Div. 3 1972); and *State* v. *Rush*, 46 N.J. 399, 217 A.2d 441, 448-449 (N.J. 1966). In fact, no right to compensation for performing legal services for private litigants is derived from the Constitution. See, *deRodulfa* v. *United States, supra*, and cases cited therein at 461 F.2d 1256. In *State* v. *Corey*, 117 N.J.Sup. 296, 284 A.2d 395, 398-399 (Passaic County Court 1971), aff'd 293 A.2d 196, 197 (Superior Court of New Jersey 1972), cert. denied 409 U.S. 1125, the constitutional arguments raised herein were rejected by the court in upholding a contempt order against an attorney for refusing to represent an indigent charged with a misdemeanor.

The respondent acknowledges that recent authority in certain other jurisdictions recognizes that the overwhelming burden of rendering gratuitous representation to indigents cannot be imposed upon attorneys alone without denying the constitutional rights of the attorneys. See *State* v. *Rush, supra*; *State ex rel. Partain* v. *Oakley, supra*; and *Bradshaw* v. *Ball*, 487 S.W.2d 294 (Ky. 1972). Nonetheless, the fact that the Missouri legislature had already remedied the situation rendered these cases inapplicable to the determination of the issues raised in the Supreme Court of Missouri. For example, in *Bradshaw* v. *Ball*, 487 S.W.2d 294, 297, 298-300 (Ky. 1972), relied upon by the petitioner, the Court of Appeals of Kentucky held that the individual attorneys were not entitled to compensation, because prior to enactment of the Kentucky Public Defender Act, the attorneys had no right to compensation. Similarly, petitioner Gibson enjoys no right to compensation for representing indigent defendants in misdemeanor cases prior to August 13, 1976.

Because of the enactment of legislation by the State of Missouri and the decision by the Supreme Court of Missouri, the only issue raised by the petitioners concerns whether or not petitioner Gibson is entitled to compensa-

tion for representing indigent defendants in misdemeanor cases prior to August 13, 1976. In *United States* v. *Dillon*, 346 F.2d 633, 636 (9th Cir. 1965), cert. denied 382 U.S. 978, this Court denied a petition for writ of certiorari based upon the allegation that attorney Manley B. Strayer was entitled to compensation for representing an indigent defendant even though statutory provision for such compensation had not been enacted at the date of his appointment. As the court-appointed attorney in *United States* v. *Dillon, supra*, was not constitutionally entitled to compensation for services performed pursuant to an appointment made prior to enactment of the Criminal Justice Act of 1964 (18 U.S.C. §3006A), petitioner Gibson enjoys no constitutional right to compensation for representing indigents in misdemeanor cases prior to August 13, 1976.

Under Rule 19 of the United States Supreme Court Rules, review by writ of certiorari is not a matter of right and will be granted only where special and important reasons exist for review. The respondent submits that this case neither presents a decision by a state court concerning a substantial federal question nor a decision by a state court improperly applying the appropriate federal decisions. Rather, the respondent submits that this case involves an application of the appropriate federal decisions by the Supreme Court of Missouri. The respondent submits that the enactment of S.C.S. H.C.S. House Bill No. 1095 relieved any burden placed upon the petitioners, and that the decision of the Supreme Court of Missouri requiring attorneys to bear the burden of providing for the defense of indigents charged with misdemeanors prior to August 13, 1976, does not operate to deny the petitioners due process of law, the equal protection of the law, or freedom from involuntary servitude. Therefore, the circumstances of this case provide this Court with no compelling reason for exercising its discretionary jurisdiction.

CONCLUSION

WHEREFORE, the respondent respectfully submits that this petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief were served by mailing, postage prepaid, this 21st day of February, 1977, to:

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